REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT
JOHANNESBURG LOCAL DIVISION

CASE NO: 2012/47250

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

31 January 2014 ..... SIGNATURE

In the matter between:

Atholl Developments (Pty) Ltd	**Applicant**
and	
The Valuation Appeal Board for the City of Johannesburg	**First Respondent**
City of Johannesburg Metropolitan Municipality	**Second Respondent**

J U D G M E N T

VALLY J

Background

1. Section 229(1)(a) of the *Constitution of the Republic of South Africa Act 108 of 1996* (the Constitution) empowers a municipality such as the second respondent to levy rates on property. Section 2 of the Local Government: Municipal Property Rates Act, Act 6 of 2004 (MPRA) empowers a municipality to levy a rate on any

property located within its area. All owners of property so levied are obliged to pay rates to the municipality. Section 1 of the MPRA defines property to include:

> "(a) immovable property registered in the name of a person, including, in the case of a sectional title scheme, a sectional title unit registered in the name of a person;
>
> (b) a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property."

2. The second respondent has decided to levy rates on the properties in its area. The applicant owns property within the area. The amount of rates to be paid on properties is subject to the value of the properties. Consequently, the valuation of the properties can, and often does, become the subject of heated controversy between the owner of the property and the second respondent.

3. Erven 482 and erven 483 Illovo Extension 4, Johannesburg ("the erven") are properties on which rates has been levied. The erven are plots of land over which the applicant has secured a registered lease for a period of 99 years ("the lease"). The erven are located in Illovo opposite the Wanderers Cricket Stadium as well as a golf club and are owned by the owners of Wanderers Cricket Stadium. The stadium is the premier cricket stadium in South Africa and hosts important cricket matches involving the national side. Illovo is one of the more affluent parts of the city of Johannesburg. The erven are within easy reach of the O.R. International Airport, the Gautrain as well as the central business districts of Johannesburg and Sandton. The properties in this area hold a significantly higher value than many others which are located in other areas within the city of Johannesburg. In terms of the leases, the applicant is entitled to construct a hotel on the erven, which the applicant took advantage of. Having constructed a

hotel thereon it has for some time now traded, and continues to trade, as Protea Hotel Wanderers. In terms of clause 4 of the lease the applicant is responsible for payment of the rates levied on the properties by the second respondent.

4 The properties were valued by the first respondent at R130 390 000.00 (One Hundred and Thirty million, Three Hundred and Ninety Thousand Rands) and R161 610 000.00 (One Hundred and Sixty One Million, Six Hundred and Ten Thousand Rands) for erven 482 and 483 respectively. The applicant maintains that these valuations are unrealistic and asks this Court to review and set aside the said valuations and replace them with a valuation of R8 000 000.00 (eight million rands) for each of the properties.The first respondent opposes the application. The second respondent has elected to abide by the decision of this Court.

5. The first respondent is a statutory body established in terms of s 56(1) of the MPRA. It is established to hear and decide any reviews or appeals against a valuation adopted by the second respondent.

6. The MPRA envisages the compilation of a valuation roll by the second respondent. It also envisages a process whereby a supplementary valuation is undertaken. This would occur in a number of circumstances, such as, for example, a case where a property has been built on vacant land subsequent to the initial valuation as depicted on the valuation roll. In terms of the initial valuation roll the two properties were described as follows:

Property details	482, Illovo, Ext 4	483, Illovo, Ext 4
Value	R5 252 000.00	R6 495 000.00

Category	Vacant land	Vacant land
Extent	5 000m^2	6 197m^2
Effective date	01/07/2008	01/07/2008

7. Sometime during 1 March 2010 – 30 April 2010 the second respondent objected to the valuation as reflected in this valuation roll.

8. The objection was raised in terms of s 50(1)(c) of the MPRA which provides that any person may object to "*any matter reflected in or omitted from*" the valuation roll. Upon receipt of an objection a municipal valuer, appointed in terms of s 33 of the MPRA, must consider the objection and "*adjust or add to the valuation roll in accordance with any decisions taken.*"[1] According to the second respondent the correct combined valuation of the two properties should be R460 286 000.00 (Four Hundred and Sixty Million, Two Hundred and Eighty Six Thousand Rands), and this should be reflected in the supplementary valuation roll which should read as:

Property details	482, Illovo, Ext 4	483, Illovo, Ext 4
Value	R151019 000.00	R309 267 000.00
Category	Residential A	Residential A
Extent	5 000m^2	6 197m^2
Effective date	01/05/2010	01/05/2010

9. The municipal valuer upheld the municipality's objection and valued the properties as reflected in the table above i.e.R151 019 000.00 for erven 482 and R309 267 000.00 for erven 483. The new valuations were reflected in a supplementary valuation roll.

[1] s 51 of the MPRA

10. In the meantime, the applicant remained blissfully unaware of the objection of the municipality and of the amended valuation. To its surprise it suddenly received a rates bill that was substantially higher than that normally received. This caused it to enquire about the developments that took place in its absence and without its knowledge.

11. If the valuation is adjusted by more than 10% (ten percent), as has occurred in this case, the municipal manager must "*promptly submit*" the valuer's decision to the relevant valuation appeal board (the first respondent in the present case) "*for review.*"[2] The review is compulsory and should have been done in the present case. However, the first respondent is also empowered to hear and decide an appeal lodged with it by anyone aggrieved by the decision of the municipal valuer.[3] The appeal can be lodged by, *inter alia*, an owner of a property affected by the decision of the municipal valuer. In the present case, the applicant being the holder of rights[4] in relation to the two erven (by virtue of the leases), as well as the party that is obliged to pay the rates levied by the second respondent, lodged an appeal with the first respondent. Before having done so it requested that the municipal valuer provide it with reasons for his decision to assign such values to the properties as he had done. He responded by stating, *inter alia*:

> "The property was valued as a unit based on the rentals and a capitalization rate prevailing at the time around the valuation date of 1 July 2007, resulting in a total value of R460 286 000.00. Values were allocated to the relevant stands, and the value allocated to stand 482 is R151 019 000.0 (and the value allocated to stand 483 is R309 267 000.00).
> The zoning of the property is Residential 4 which allows for hotel and ancillary activities. This was unfortunately overlooked during the objection period, which

[2] s 52 of the MPRA
[3] s 54 of the MPRA
[4] s 1 of the MPRA defines an owner in relation to immovable property as "*a person in whose name ownership of the property is registered*", and in relation to a right registered against the immovable property as "*a person in whose name the right is registered.*"

> resulted in a category of "Residential". The administrative error is being corrected on our systems to "Business & Commercial"."[5]

12. What is clear from his response is that he attached values to the land and the buildings thereon. He had no engagement with the owner of the land or with the applicant who held rights against the land in terms of the leases. He was, therefore, not aware of the leases and accordingly attached no values to them.

The powers of the first respondent

13. It bears noting that the first respondent is given wide powers to deal with the appeal or the review before it. This is patent from the provisions of the MPRA which allows for the first respondent to summon any person to appear before it to give evidence or to produce a document that is available to that person, to accept evidence on oath and to question any person or allow for that person to be questioned.[6] The purpose for such wide powers is to allow for the appeal to consider the matter *de novo*. This is bolstered by the description in the MPRA of "*functions*" of the first respondent when attending to appeals, which provides, *inter alia*, that it is to

> "*hear and decide appeals against the decisions of a municipal valuer concerning objections to matters reflected in, or omitted from, the valuation roll.*"[7]

The proceedings before the first respondent

14. The lodging of the appeal resulted in the first respondent holding a hearing to determine the value of the properties - the erven together with the improvements.

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[5] Founding papers, pp 106-108
[6] s 75 of the MPRA
[7] s 57(a) of the MPRA

15. The appeal form completed by the applicant to record its appeal against the decision of the municipal valuer gave no information as to what the grounds of the appeal were. Nor did it furnish all information that was required of the applicant. The form requires the applicant to give details of any "*endorsements against the property*". The applicant failed to furnish this information. Instead, it simply wrote the words "*at hearing*" in manuscript, thus indicating that the said information would be furnished at the hearing of the appeal before the first respondent.

16. The proceedings commenced with the representative of the applicant raising a legal point, which he later withdrew. Had the legal point been upheld the matter would have been remitted to the municipal valuer for a reconsideration of his valuation. More importantly, the applicant's representative, for the first time, revealed that the applicant was not the owner of the erven but the holder of the rights to the erven. This raised the question of how should the properties be valued: should they be valued, as the municipal valuer did, by placing a value on the erven together with the buildings (i.e. by treating them as two immovable properties and assigning a value as per part (a) of the definition of property in the MPRA), or should the lease agreements be valued separately from the erven (as they fall squarely within the terms of part (b) of the definition of property in the MPRA)?[8] The question was posed to the representative of the applicant who answered in the following terms:

> "It is correct to say there is a 99 year lease hold on the land registered in favour of the Developer, in this case Atholl Properties, who is also the Protea

[8] See para 1 above.

> Hotel Group. Yes, our argument would be first and foremost that looking at the definition of market value, willing buyer, willing seller, that a willing buyer will look at the property Stand 482 and 483 Illovo Ext 4 as an entity and the entity is the land and because this is motivated by the fact that the lease is in place and we will argue and prove that the only benefit of a potential buyer, would be the income of a registered lease and therefore the buildings, it will be argued that the buildings carry no value for the potential buyer as at the date of valuation and therefore the buildings must be disregarded."[9]

17 He asked that the approach adopted by the municipal valuer be found to be wrong because the municipal valuer took into account the construction of a four-star hotel on the erven which was commercially operative, but which, according to him, did not belong to the owners of the erven. It belonged to the leaseholder, the applicant in this case. In other words, he argued, the valuation roll should only reflect the value of the two erven while the value of the rights registered against the erven should be ignored altogether. This led him to argue that the true value of the two erven is R8 000 000.00 (Eight Million Rands) each.

18. It is also worth bearing in mind that the right the applicant has secured is, *inter alia*, the right to operate the hotel, and that, it is common cause, could command a considerable price on the open market. Thus, if the applicant's contention was to be accepted, then the first respondent would have had to determine four valuations – one for the two erven and one for each of the rights against each of the erven. Before a final decision on the issue was taken, the applicant's representative asked that the municipal valuer present his case as to how he came to value the property at R460 286 000.00. In accordance with this request the municipal valuer testified that he combined the two erven, giving a total size of 11, 197 m^2, and that he valued the erven as well as the improvements thereon

[9] Record, pp 5-6

(a commercially vibrant four-star hotel) as one. However, he stated that only at the hearing did the applicant, through its representative, furnish him with information concerning the number of rooms, the nature of the rooms and the potential rental per room per night. Having received this information he undertook a fresh valuation by factoring it into his calculation and came to the conclusion that the value of the property is actually R385 952 000.00 as opposed to the R460 286 000.00 he initially arrived at. He stated:

> "The monthly net income ... (is) R3 377 043.00. Multiplied by twelve gives an annual net income of R40 524 517.00, and that was rounded off to R40 525 000.00 and that amount was capitalised at 10.5% to give a value of R385 952 000.00."[10]

19. The initial valuation was based on his own research, which he accepted was not exhaustive and which was now enhanced by the applicant's willingness to furnish some information about its income. He explained further that during his initial valuation he took note of the prices obtained for sales of hotels in the nearby vicinity. Further, he took note of the fact that this applicant's hotel is within close proximity of all the important amenities as well as central business districts, and that it holds a four-star rating. In my view, he gave a fairly detailed and rational explanation as to how he came to assign the initial value as well as how he came to the revised valuation. It is important to note that he was careful to add the caveat that the revised valuation was based on an uncritical acceptance of the figures supplied by the applicant.

20. Upon hearing the explanation, the applicant's representative made the following comment:

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[10] Record, p 47

> "... in my opinion and I agree with Mr Meyer's (the municipal valuer) value of R400 Million and R370 Million, but that will represent the value of the concern, the Franchise. Lock, stock and barrel and the goodwill value".[11]

21. He, however, criticised the valuation on the basis that it failed to recognise that in order to earn the rental income on which the valuation was based, it is necessary to have the appropriate infrastructure in place and absent the infrastructure the valuation would decrease substantially. Through this averment he hinted that the hotel may hold the value of between R300m and R400m for the applicant but would not necessarily hold the same value for someone else. This is because a third party would not necessarily have the same infrastructure, or hold the same brand value, as the applicant and therefore would not necessarily generate the same income as the applicant. Thus, he complained that it is the business of the applicant that was being valued and not the property of the applicant:

> "(Mr Meyer) has valued the business and he have (sic) not valued, in my opinion, the brick and mortar."[12]

22. Having critiqued the methodology of the municipal valuer, the applicant's representative then presented his own evidence, which largely consisted of going through a report compiled by himself, and addressed to the applicant. It would appear that he was employed as an independent professional valuer by the applicant to determine the value of the property so that it could challenge the valuation of the municipal valuer. After compiling his report, he completed and signed the appeal form that was lodged with the first respondent. This, he signed on 20 April 2012.

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[11] Record, p 55. See also p 58
[12] Record, p 59

23. His report records his brief to be:

> "To prepare a counter rateable valuation and category with motivation for support of a valuation objection against the City of Johannesburg."[13]

24. After relaying some of the facts about the state, size and location of the property as well as the nature of the hotel's business that he drew from some studies concerning the hotel industry, he states the following with regard to the valuation of the hotel:

> "As is customary or specific to the subject property brief, the following methodology is applicable to and used in determining the results set out
>
> - **Building Cost Approach to** Value
>
> Estimated New Replacement Value R301 822 500
>
> - **Depreciated Replacement Value (DRV)**
>
> This method takes the ENRC(there is no account in the report of what the acronym refers to)then discounts the amount to reflect the existing DRV of the improvements. A cost to cure method can be used which estimates the amount needed to restore the improvements to their prime/ competitive condition, which amount is then subtracted from the ENRC. Alternatively, a Straight-Line Method of depreciation is used based on the useful economic life of the improvements.
>
> DRV based on building cost approach R205 239 300
>
> - **Capitalised Rental Approach**
>
> Market related at a 10.5% cap rate R152 168 085"[14]

25. There is no explanation in the report as to how he came to the actual values that he attached to each of the different valuation methods. They are merely asserted. However, having listed them he endorsed the lowest value by stating:

> "**VALUATION CONCLUSION**
>
> After inspecting the property and taking into account the location of the property, the gross developed area, the known obsolescence factors and

[13] Record, p 240
[14] Record, p 249

> prevailing market conditions, the value, as at the effective date of valuation, is estimated at R152 000 000 (One Hundred and Fifty Two Million Rand)"[15]

26. There is no indication in the report as to why he believed the lowest valuation of the three that he identified is the correct one. At the hearing, however, he said:

> "So if I may just, I just want to qualify something. In this valuation report I have valued the lease, the lease valued registered over the property, for a figure of R152 Million, based on the audited figures from Protea Hotel Wanderers and then what I've done was I want to qualify that. The value of R152 Million I actually want to replace with a value of R117 Million as per "E3""[16] (emphasis added).

27. During his submission he explained that he used audited figures of the hotel in question because:

> "that in any one's mind is, if you value that property as is, at the date of valuation, in the hospitality industry, with the reputation of Protea Hotel or the Tsogo Sun or whoever, the income generated is very much linked to your goodwill value."[17]

28. He did not explain how he calculated the "*goodwill*" value of the hotel. He remained adamant though that R117m is "*the value of the lease that is registered against the property 482 and 483 Illovo Extension 4.*"[18] He was asked if the applicant would be willing to sell the hotel as well as the rights to the lease on the open market for R117m. He answered by stating that the hotel as well as the land would "*have been sold at round about R131 Million*"[19] The difference between the two is, in his opinion, the value of "*the land*", i.e. two erven. He claimed that the hotel is generating income to yield a value of R152m.[20]

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[15]Record, p 250
[16]Record, p 61
[17]Record, p 62
[18]Record, p 71
[19]**Record, p 77**
[20]Record, p 85

29. There was some controversy about the accuracy of his figures at the hearing and he was either unable or unwilling to furnish the actual income and expenditure statement as well as a breakdown of the actual charges levied by the applicant to a patron who lets a room for the night. The applicant presented a witness to explain its business. He was asked a direct question as to what a daily rate for a double room was. He evaded the question.

30. In his summation address, the applicant's representative shifted the emphasis by contending that the applicant's objection to the municipal valuer's valuation was that the municipal valuer placed a value on the business of the applicant rather than from the erven and the income derived from it only. The business of the applicant, which is the running of a four star hotel on the erven, should be excluded from the valuation. He accordingly pressed the first respondent to value the properties at R8m each. He stated:

> "the value of the lease entry is for another day's discussion, when there is an objection against an omission or there was a supplementary done on it and it is then contested Chair. In my opinion, currently all that we have in front of us, is Stand 482, 483 which is subject to a lease, a very limiting lease and therefore impacts on the value a lot and that is where I would like to leave it."[21]

31. This submission was strange for two reasons: firstly, his claim that the value of the property was R117m was, according to himself, a valuation of the leases, and secondly, when the second respondent had initially objected to the valuation, and when its objection was dealt with by the municipal valuer, no one, except for the applicant, was aware that the leases existed. Having revealed the existence of the leases, the applicant sought to use this fact as a sword to strike down the valuation of the municipal valuer, and as a shield to avoid the burden

[21] Record, pp 121-122

of having to pay for rates on the hotel. The former it hoped to achieve by showing that the municipal valuer had ignored a crucial fact about the properties as a whole (the erven as well as the leases). The latter it hoped to achieve by insisting that the hotel is a separate property that is not "*owned*" by the owners of the erven and therefore cannot be valued for purposes of determining the rates that are payable on the erven.

32. The contention of the applicant's representative that only the erven, separated from the hotel built on them, should be valued for purposes of determining the true value of the rateable property is, in my view, fallacious. It was, correctly, rejected by the first respondent. Save for its complete destruction, the hotel cannot be removed from the erven. In his valuation, the municipal valuer treated the hotel as part of the erven. By so doing he had not breached, or overlooked, any provisions of the MPRA or any other law. The fact that the applicant is not the owner of the erven, but a holder of rights against the erven, which rights treat the hotel as a separate entity, is not material for the purposes of the valuation of the erven for purposes of determining the rates that should be payable on them. In terms of the MPRA, the second respondent and the municipal valuer could, if they so desired, assign separate values to them, but they are not obliged to do so. When he assigned a value to the erven the municipal valuer was unaware of the separate legal rights held by the applicant, as these arose from private treaty and were only disclosed at the hearing before the first respondent. In any event, even if he was aware of such separate legal rights at the time he assigned a value to the erven, he was not legally obliged to place a separate value on those rights. It lies within the discretion of the second respondent whether it wishes to

assign values to rights such as leases and to impose rates upon them. The second respondent, it is common cause, has not adopted a policy to value the rights registered against an immovable property separately from the property itself. It has decided to adopt a policy with regard to the valuation of immovable property which includes all structures built thereon, and to impose rates on immovable property as a whole regardless of whether the rights in part of, or the entire, immovable property have been dispensed with. This is the approach it has adopted for all immovable property within its area. Should the owners of an immovable property enter into a private treaty with anyone else as to who should bear the cost of the building of any structure on the immovable property, who should have what use of the whole, or part, of the property and who should shoulder the burden of paying for the rates levied on the entire immovable property, is a private matter for the owner and its contracting parties. The second respondent is entitled to look to the owner of the immovable property for the payment of such rates. The municipal valuer, who worked within the parameters of this approach as it was universally applied within the jurisdiction of the second respondent, committed no error in this regard.

The decision of the first respondent

33. The first respondent, however, adopted a different approach. It took note of the evidence before it, the submissions presented by each of the parties, and faced with the fact that the erven were encumbered with the leases came to the conclusion that the applicant's submissions were correct: that each erven should have two values assigned to it. It did not feel constrained at all by the fact that the second respondent and municipal valuer chose instead to assign a single

value to each erven. It relied on the powers endowed upon it by s 57(a) of the MPRA. Its finding and ruling is expressed in the following terms:

> " (It) is at liberty to insert an additional entry into (sic) the roll, if (it) is of the view that it was incorrectly omitted by the Municipal Valuer.
>
> (It) is of the unanimous view that the roll should reflect two entries per property.
>
> The Municipal Valuer conceded that only one entry appeared in (sic) the roll per property, as the Municipal Valuer was not aware of the registered lease.
>
> (The applicant's representative) was of the view that under normal circumstances two entries per property should have been reflected in (sic) the valuation roll.
>
> (The applicant's representative) was of the view that the omission of the registered lease should be addressed in (sic) a supplementary valuation in terms of Section 78 of the MPRA.
>
> The Valuation appeal Board is of the view that in accordance with Section 57(a) of the MPRA, the valuation roll can be amended with the inclusion of the registered lease.
>
> RULING
>
> In conclusion the Valuation Appeal Board is of the unanimous view that the total value of the properties are as follows:
>
> - R308 000 000 divided as follows:
>
> Stand 482 Illovo Ext 4
> Property: R8 000 000
> Registered Lease: R130 390 000
> Category: Business Commercial
>
> Stand 483 Illovo Ext 4
> Property: R8 000 000
> Registered Lease: R161 610 000
> Category: Business Commercial
>
> Effective Date: 1 May 2010"[22]

[22] Record, pp 381-382

34. That constitutes the sum total of the first respondent's reasoning. There is no explanation as to how it came to assign the respective values to each of the leases that are registered against each of the erven. There is no valuation placed on the improvements to the erven, which includes the structure of the hotel and all other incidental improvements necessary for the operations of the hotel, such as for example, the parking areas.

35. The total valuation placed on the properties is R308m. It is within the range accepted by the applicant as a fair valuation if the "*Building Cost Approach*" was adopted. According to the applicant such an approach would yield a valuation of R301 822 500.00. Notwithstanding the similarity between the two valuations, the applicant was aggrieved by the valuation assigned by the first respondent. It sought further reasons from the first respondent. The first respondent responded by stating that it was common cause that the registered leases were not included in the valuation of the municipal valuer, which omission was incorrect and that:

> "Once the Valuation Appeal Board became aware of the existence of the registered lease (sic), the Board was duty-bound to act in accordance with Section 57 of the MPRA
>
> In terms of Section 78(1)(a),(e) or (f), the registered lease should have been included in the valuation roll."[23]

36. The further explanation merely indicates why the first respondent decided to include the leases in the valuation, but it does not give any indication as to how each of the leases were valued. The applicant remained dissatisfied and as a

[23] Founding papers, p 120

result elected to launch these proceedings wherein it seeks to have the decision of the first respondent reviewed and set aside.

The grounds for review raised by the applicant

37. To secure the relief it seeks, the applicant relies upon and draws specific reference to ss6(2)(a)(i), 6(2)(d), 6(2)(e)(i) and 6(2)(h) of the *Promotion of Administrative Justice Act, No 3 of 2000* (PAJA).[24] PAJA was enacted in terms of s 33 of the Constitution. Section 33 of the Constitution guarantees that all persons subject to administrative action shall be treated lawfully, reasonably and in a procedurally fair manner. It calls on the legislature to enact national legislation to give effect to this guarantee. The legislature complied by enacting PAJA. Prior to the Constitution and PAJA a vast body of judicial learning developed over the years to ensure that persons subject to administrative decisions were treated lawfully and in a procedurally fair manner. The learning is complex as well as complicating. It also embodies the painful experiences of many under the legal order that prevailed prior to 1994.

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[24] The relevant sections of PAJA read:

"6(2) A court or tribunal has the power to judicially review an administrative action if-

(a) The administrator who took it-

(i) was not authorised to do so by the empowering provision

(d) The action was materially influenced by an error of law

(e) the action was taken-

(i) for a reason not authorised by the empowering provision

...

(h) exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or,

..."

38. PAJA certainly draws on this learning and codifies the rights referred to in s 33 of the Constitution and "*purports to cover the field*".[25]

39. The applicant contends that the first respondent erred in taking into account factors that were irrelevant when making a determination on the value of the properties. The leases are irrelevant and by focussing on them and taking them into account for purposes of determining a fair valuation of the properties it lost perspective of its statutory duties: the leases, according to the applicant, should not have been taken into account at all. It must be remembered though that it was the applicant's representative that made reference to the leases at the hearing. He made mention of them at the commencement of the proceedings, something he had concealed up until that moment. Thereafter he continued throughout the proceedings to focus on the leases by assigning a value to them. The value he assigned was R117m. He spent a considerable amount of the hearing's time trying to convince the first respondent that it should accept his valuation. In the meantime he avoided any discussion of the fact that by his own account a "*building cost approach*" to the valuation would yield a value of "*R301 822 500*". To this should be added the valuation of R16m for both erven, and so by his own account the valuation could, or should, be R317 822 500.00. This is significantly higher than the R117m he claimed was the value of the two leases combined. The differences in valuation aside, his entire explanation focussed on this valuation of the leases. Further, he was particularly evasive and obfuscatory when asked direct questions as to what price the erven may yield if sold with the operating hotel on the open market, or for that matter what income the applicant

[25] *Minister of Health v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at [95]

earned from the operations of the hotel. In any event, the first respondent allowed itself to be distracted by his input and proceeded to determine the value of the leases. Ironically, the applicant seeks to take advantage of this distraction by seeking to have the decision of the first respondent reviewed and set aside on the grounds that the distraction resulted, *inter alia*, in the first respondent taking "*a decision it was not empowered to do so*".

40. The first respondent was placed in an unenviable position. By introducing the leases and presenting evidence as to their value, the applicant had forced it to take note of their existence. If the first respondent had ignored them it would have exposed itself to the possibility of having its decision attacked on the basis that it had failed to take into account relevant evidence. If the evidence was factored into the determination of what was a fair value of the combined properties (the erven as well as the leases), then again the first respondent would have been exposed to the possibility of having its decision attacked on the basis that it took irrelevant factors into account.

41. The criticism that it should not have assigned a value to the leases may be harsh in these circumstances, but it is not entirely without foundation. The municipal valuer informed the first respondent that he was unaware of the leases and that his valuation was based on the "*willing buyer willing seller*" principle. This valuation was not interrogated sufficiently. The first respondent did not have to agree with the applicant that the leases should be valued separately from that of the erven. Having received evidence of the existence of the leases, as well as the applicant's contention as to their value, it should, nevertheless, have found

that the municipal valuer committed no error by assigning a value to the erven without taking note of the leases. Thereafter, it should have examined that value and come to its own conclusion as to the fair value. In doing so, it would have been free to utilise the "*willing buyer, willing seller*" approach or the "*building cost*" approach. This is particularly so because the only evidence as to the value of the leases was that of the applicant. That evidence was at the very least ambiguous and, of course, controversial. The way that evidence was revealed made it impossible for the first respondent or the municipal valuer to critically scrutinise it.

42. It is contended by the applicant that the first respondent was not empowered to assign a value to the registered leases at a time when the second respondent had not taken a decision to assign values to such property, and to levy a rate against it. The applicant further contended that the first respondent erred in law by deciding to attach a value to the leases when the municipal valuer had not done so. The fact that the first respondent had powers to consider the matter *de novo* did not entitle it to scrutinise the leases and attach values to them in the absence of the municipal valuer having first done so. The omission of the municipal valuer cannot be rectified by the first respondent acting of its own accord. There must be an appeal, specifically directed at the omission, for the first respondent to be able to exercise its powers to rectify it. In the present case the appeal was directed at the valuation of the erven only and as such that was all that was laid before the first respondent. Thus, the appeal should have been dealt with on "*the initial factual position (i.e. the position reflected on the original*

roll)."[26] Thus, the applicant claimed that the first respondent erred in law by holding that the phrase contained in s 57(a) of the MPRA, "*to hear and decide appeals against the decisions of a municipal valuer ... omitted from, the valuation roll*", granted it powers to attach a value to the leases.

43. The first respondent held the view that there was no need for it to be limited only to assigning a value to immovable property in cases where the second respondent had adopted a policy with regard to the specific class of immovable property. Thus, it maintained, the fact that the second respondent had not elected to assign a value to the class of property referred to in paragraph (b) of the definition, did not bar it (first respondent) from proceeding to assign a value to such property. This, it claimed, was a natural consequence of the provisions of s 57(a) read with s 75 of the MPRA.[27] There is no doubt that s 57(a) of the MPRA endows the first respondent with wide powers. It is common cause that this section allows it to consider the valuation of all property as defined in the MPRA *de novo*. This is regardless of whether it is considering a "*review*" or an "*appeal*" against the decision of a municipal valuer. Hence, the "*appeal*" it considered in this regard is an appeal in the wide sense as it "*is a complete re-hearing of, and a fresh determination on the merits of the matter with or without additional evidence or information.*"[28] I find myself in agreement with the first respondent in this regard. It is not restricted to the approach adopted by the municipal valuer even though it is sitting in an "*appeal*" against his decision. Neither is it restricted by the approach adopted by the second respondent.

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[26] Applicant's heads, para 19.6
[27] See para 13 above.
[28] *Tikly& Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F See further the cases there cited.

44. An error of law is one where the tribunal

> ""asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or failed to apply its mind to the relevant issues in accordance with the behests of the statute".[29]

45. As a result of such error of law its decision should be reviewed and set aside.

46. I cannot agree with the submission that the decision to focus on the leases, as invited to do so by the applicant, was an error of law. The leases constitute property in terms of part (b) of the definition as expressed in the MPRA. A value for purposes of levying rates can be assigned to them. The first respondent is correct that by virtue of its wide powers and its original jurisdiction it is empowered to assign a value to the leases even if the municipal valuer or the second respondent did not do so.By proceeding to consider the leases the first respondent did not "*ask itself the wrong question*", or "*applied the wrong test*", or "*based its decision on some matter not prescribed for its decision*", or "*failed to apply its mind to the relevant issues in accordance with the behests of the statute.*" The statute conferred wide powers upon it and it acted within the parameters of those powers.

47. The only issue in this case is what evidence the first respondent relied upon to determine the value of the leases, and this is not clear from its decision. In fact, there is no indication as to what criteria it used to assign value on the registered leases, or what evidence it relied upon to make the determination it did. It did not do so in the decision itself, in the supplementary reasons it furnished, nor in the answering affidavit filed on its behalf. An examination of the evidence led at the

[29] *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93H-I

hearing demonstrates that there was nothing before the first respondent that justified it assigning the values it did on the leases registered against the erven. The first respondent does not identify the evidence it relied upon to assign values to the leases, what methodology it applied and why it came to the conclusions it did.

48. It is, furthermore, correct that the second respondent has not adopted a policy to levy rates on registered leases, such as the ones found in this case. There is most probably good reason for this. Many immovable commercial properties have such leases registered against them. As we see from the definition of property in the MPRA[30] such registered leases are themselves regarded as property, and in terms of the MPRA susceptible to being rated by the second respondent. However, for the second respondent to do so, it would have to identify the criteria it uses to attach a value to these registered leases in order for there to be some certainty for holders of such properties as to what their potential liability for rates would be. Once it has assigned a value to a particular property, the person affected by that decision can have some idea as to why a particular value was assigned, and can then take an informed decision as to whether it wishes to object to the valuation or not. If it elects to object it can fully identify the grounds upon which it relied for the objection to be upheld. Further, if there are no criteria, not even the valuer can be sure of what evidence he/she should have relied on to arrive at a fair valuation of the property. Absent clearly identified criteria the margins for a valuation based on arbitrary grounds is too

[30] See para 1 above

wide to allow for the valuation to be fair and reasonable. A fair valuation is one that can be objectively assessed.

49. The same applies to the first respondent. While it was not prevented from assigning a value to the leases, it was, nevertheless, required to (i) spell out what evidence it relied upon to assign values to the leases; (ii) what methodology it applied to so do and finally, (iii) how or why it came to the conclusions it did. This it did not do, but its failure to do so is not an error of law. It is a case of the decision maker arriving at a conclusion that cannot be reconciled with the evidence before it, and is therefore one that "*no reasonable decision-maker could reach*"[31]. This falls squarely within the terms spelt out in section 6(2)(h) of PAJA.

50. The first respondent should have focussed on the value of the erven together with the improvements thereon, which consisted of the hotel. It should have assigned values thereto. This was rejected by the first respondent, who instead upheld the applicant's contention that the leases should be valued separately because a potential buyer may not be willing to pay the price the municipal valuer believed was fair. The applicant contended that the potential buyer would have to accept that the erven are encumbered by the leases, and the return on the leases did not justify such a high price for the erven. But this argument is fallacious. By having the hotel built on the erven, the owner of the erven had made improvements to its properties which justified the valuation placed on them by the municipal valuer. The fact that the owner entered into a private

[31] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [44].

treaty that may lack commercial appeal to others should not eclipse the fact that the erven had, by virtue of the extensive improvements, increased substantially in value. If the leases were to be used to reduce the value of the erven on the basis that they encumbered the erven and had limited commercial appeal to third persons, then the purpose and object of the MPRA would be defeated. Owners of erven would find appeal in entering into a lease with a private company (which may even be established solely for purposes of concluding the lease) on terms that are extremely attractive to the private company but unattractive to third parties, and as a result discourage third parties from purchasing the erven. The effect would be that the value of the erven was artificially kept low and the owner was then able to have the amount of rates to be levied on the erven kept well below what is fair. After all, fairness with regard to rates payable on properties must take into account what is fair to the second respondent, who for all intents and purposes acts on behalf of all the ratepayers who have an interest in ensuring that the burden of paying rates is equally borne by all.

51. In my view, had the evidence and discussion before the first respondent remained focussed on the "*building cost approach*" (as suggested by the applicant), or the "*willing buyer, willing seller*" approach (as suggested by the municipal valuer) there is no doubt that the first respondent could have made a determination on the value of the properties that was fair to the owners as well as to the second respondent. The "*building cost approach*" adopted by the applicant is not inconsistent with the "*willing buyer willing seller*" approach adopted by the municipal valuer. The "*willing buyer willing seller*" approach has

to be based on the premise that the purchaser will be purchasing the leases as well as the erven in a single transaction. To separate the two only serves to obscure the true value. The true value can be arrived at by using either method. Relying on the *"building cost approach"* the applicant came to the conclusion that a valuation of between R300m to R400m was not unrealistic. This is within reach of the valuation of the municipal valuer.

Conclusion

52. For the aforestated reasons the decision stands to be reviewed and set aside.

53. Both parties requested for the matter to be remitted to the first respondent for reconsideration if its present decision was reviewed and set aside. I see no reason to refuse the request. The first respondent is in the best position to deal with it. Hopefully it will be dealt with expeditiously so that the applicant can be charged a fair amount for the rates it has to pay. It does not go unnoticed that it has for many years now been paying an amount well below what any reasonable person would regard as fair.

54. Before closing, it bears mentioning that the applicant was not always forthcoming with information at the hearing before the first respondent, and this did not make the first respondent's task easy. I hold that the applicantis required to fully co-operate with the first respondent and to assist it in fulfilling its task. Bodies such as the first respondent perform important duties in maintaining the rule of law.They can only perform their duties effectively if the parties before them fully co-operate with them.

Costs

55. Both parties agreed that costs should follow the result.

The order

56. The following order is made:

1 The decision of the first respondent handed down on 13 June 2012 is reviewed and set aside.

2 The matter is remitted to the first respondent for reconsideration of the objection of the applicant against the decision of the municipal valuer.

3 The first respondent is to pay the costs of this application.

B Vally J
Judge of the Gauteng High Court

Appearances:

For the Plaintiff	:	A Subel (SC) (with him Adv A Friedman)
Instructed by	:	Shapiro-Aarons Inc
For the Defendants	:	M Rip (SC)
Instructed by	:	Ivan Pauw & Partners
Date of hearing	:	21, 22 October 2013
Date of Judgment	:	31 January 2014